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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, *Petitioner,*

vs.

WILLIAM P. MACCRACKEN, JR., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR THE RESPONDENT

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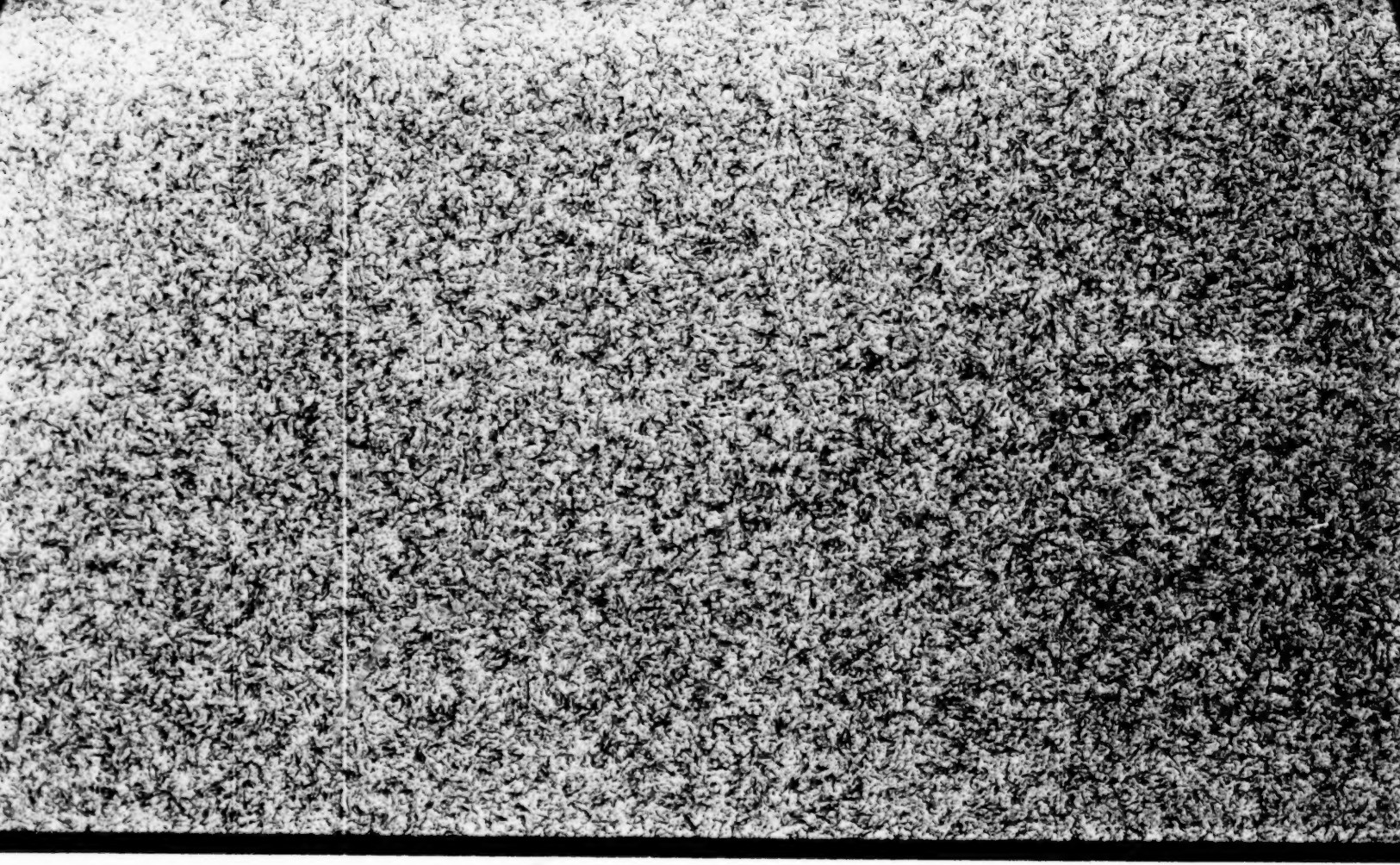

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BRIEF FOR THE RESPONDENT

I.

QUESTION PRESENTED

This case involves as its sole question the power of the United States Senate to arrest a private citizen with a view to punishing him directly and without recourse to the courts for the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could no longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest.

II.

STATEMENT OF THE CASE

We are unable to accept petitioner's statement of the case as being sufficiently clear, accurate or detailed to

afford a proper understanding of the questions hereinafter dealt with. A complete, and at the same time concise, statement of all of the facts in the case is contained in the majority opinion of the United States Court of Appeals for the District of Columbia. Of the majority opinion, the dissenting opinion accurately says: "The essential facts to an understanding of the case are fully set out in the opinion, and it is not necessary or desirable to repeat them here" [R. 118]. In the interest of brevity we, therefore, adopt the statement of the case contained in Mr. Justice Robb's opinion without repeating it here [R. 109-114].

III.

ARGUMENT

A.

RESPONDENT'S ALLEGED OFFENSE AND THE STEPS TAKEN BY THE SENATE TO PUNISH SUCH OFFENSE AS A CONTEMPT OF THAT BODY.

(1) The acts complained of were past and completed acts.

The essential and vital facts in this case are those which have been described in the opinion of the United States Court of Appeals for the District of Columbia as the "Brittin incident" and the "Givven incident" and the resulting action of the Senate in having respondent arrested and deprived of his liberty by its Sergeant-at-Arms under its Resolution 172 [R. 80] and its warrant of February 9. [R. 2, 35; Exhibit "A", R. 13 to 14].

It is of vital importance and of the essence of this case to keep always in mind that at the time of the adoption of Senate Resolution 172 both the "Brittin incident" and the "Givven incident" were closed. They were completed transactions.

Contrary to petitioner's insistence, no importance can be attached to the fact, if it be a fact, that a part only of the papers taken from respondent's office by Brittin were

recovered by the Senate Committee. These papers had been taken from MacCracken's and Lee's office by Brittin without respondent's knowledge, acquiescence or consent, and had been destroyed by Brittin without respondent's participation or knowledge, and were at the time of the adoption of Senate Resolution 172 as unavailable to respondent as they were to the Senate or its Committee. Respondent had nothing to do with, and was in no way responsible for that unavailability. [R. 6-8; 58, 59, 60, 67]. The papers which had been taken from respondent's office by Givven, to be examined by Hanshue, respondent's client, before he decided whether or not to waive privilege, had been returned and delivered to the Senate Committee on February 3, 1934, two days prior to the adoption of Senate Resolution 172. [R. 9]. They were available to the Senate and its Committee at the time of the adoption of that resolution and were not at that time avail ble to respondent.

Respondent was subpoenaed *January 31st**; he appeared as a witness that day and then produced every document called for, save only those which, in his honest judgment, he could not lawfully produce without consent of his clients. *February 2d* he testified to the Givven and Brittin incidents—to his part in the former, his lack of part in, or knowledge at the time it occurred, of the latter. *February 3d* all of the papers taken by Givven for examination by Hanshue were produced and delivered to the Senate Committee. *February 5th* every paper called for which respondent could produce (all clients having then waived privilege) was produced, and delivered to the Senate. By *February 6th* every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate. Respondent had nothing to do with the fact, if it be a fact, that any Brittin paper was not produced. *February 9th*, when there was nothing further the Senate desired to *compel* respondent to do or to *restrain* respon-

*Except where otherwise noted, all italics in this brief are ours.

dent from doing, the warrant of arrest involved in this case was issued.

There was nothing which the respondent could do to alter the situation. He was at the time of the adoption of Senate Resolution 172 and at the time the warrant, which caused him to seek *habeas corpus*, was ordered to go out, utterly powerless to alter the situation as it then existed in the slightest degree. The only *act of his* (permitting a client to have for examination papers which the client promptly returned and delivered to the Senate Committee) charged as a contempt was then as completely closed and beyond his power to add or detract from, or the legal consequences thereof, as were the transactions which the select committee of the Senate had been originally appointed to investigate.

Moreover, no question relating to the subject of the inquiry had been propounded to respondent which had not been answered by him [R. 11, Pet. Par. 30]. He had refused to answer no question but, on the contrary, professed his entire willingness at all times to answer any additional questions or furnish any additional information to the Committee, pursuant to its subpoena [R. 11, Pet. Par. 30]. There is no place in the record of the proceedings before the Senate which in any way suggests that at the time of the adoption of Senate Resolution 172 any further or additional information in the possession of respondent had been refused or would be refused by him, or was desired of, or required from, him [R. 11, Pet. Par. 30].

(2) Senate Resolutions 169 and 172 are essentially different; the former was adopted in furtherance of a valid legislative function and the latter in furtherance of an invalid judicial function.

If, in view of these circumstances, any doubt can be said to exist concerning the entire finality of the transactions which resulted in the adoption of Senate Resolution 172, it is at once dissipated by an examination of that resolution itself.

The certain and unequivocal language of that resolution provides that respondent and others involved in the Brittin and Givven incidents be cited "to show cause why they should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files and memorandums from the files of William P. MacCracken, Jr." after the service of a subpoena upon him [R. 80]. The warrant under which respondent was taken into custody and all subsequent proceedings were conducted under and by virtue of this resolution, unaltered and unchanged in any particular. No extended argument is needed to show that even the Senate itself, in the language of its own resolution, considered the acts of respondent, which it regarded as obnoxious to it, final and completed acts. Senate Resolution 172 is final and definite in its terms, and charges the commission of past and completed acts just as would an indictment or information based upon the same transactions.

Nor is there even a suggestion in the resolution itself or in the proceedings subsequent to the time of its adoption to the effect that other and additional information was required of respondent. The sole and only purpose of this resolution and the proceedings contemplated thereby, according to the undisputed facts, the resolution itself, and the proceedings had thereunder, was the punishment of respondent for past and completed acts which, in the opinion of the Senate, constituted a contempt of that body.

It will serve, we believe, to illumine the argument by calling attention to the Senate's recognition of the distinction between the proceedings instituted by Resolution 169, adopted by that body on February 2nd, and the warrant for the arrest of respondent issued thereunder [R. 76, Exhibit I], *and* Resolution 172, of February 5th [R. 85, Exhibit K], and the warrant issued under it [R. 13-14, Exhibit A].

The Air Mail Investigating Committee having reported to the Senate that respondent, under the claim of privilege had failed and refused to produce before that Committee documents called for by its subpoena served on respondent, the Senate adopted Resolution 169 by which, after reciting the service of the subpoena and the failure to produce all papers described therein, it was declared that—

> "Whereas, the appearance and testimony and correspondence, records, files and books are material and necessary *in order that the Committee may* properly execute the functions imposed upon it and *obtain information necessary as a basis for such legislation* as the Senate may deem necessary, concerning ocean and air mail contracts: Therefore be it
>
> "Resolved, That the President of the Senate issue his warrant, commanding the Sergeant at Arms or his deputy, to take into custody the body of the said William P. MacCracken before the bar of the Senate and to bring with him the correspondence . . . referred to and *then and there to answer such questions* pertinent to the matter under inquiry . . . *as the Senate may propound* . . ."

Obviously, the Senate was here following the precedent of *McGrain* v. *Daugherty*, 273 U. S. 135.

Under the warrant based on Resolution 169 petitioner was arrested, brought before the bar of the Senate, and released [R. 80].

Subsequent to the foregoing, Resolution 172 was adopted and it is to be noted that it no longer recited, or even pretended, that its purpose was to "obtain", or in any way further, or facilitate, the obtaining of, "information necessary as a basis for such legislation as the Senate may deem necessary." And it is likewise to be noted that its purpose was not to have respondent appear before the Senate's bar "then and

there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound." These were the purposes set forth in Resolution 169 and that was the function of the warrant based on that resolution. Respondent in no way challenged the legislative legitimacy of Resolution 169 or the validity of the warrant for his arrest based thereon. When, however, the Senate adopted its Resolution 172, and thereafter issued its February 9th warrant, it declared no such legislative purpose, it neither sought nor pretended to seek for information or to have answered questions pertinent to the matter under inquiry by its committee. On the contrary it flatly commanded that respondent, Brittin, Givven and Hanshue, appear at its bar—

> ". . . to show cause why they should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files and memorandums" from petitioner's files "after a subpoena had been served upon" him [R. 80].

And the warrant which deprived him of his liberty and took him into that custody which in this case he seeks release from declares the single purpose of the seizing of his body to be to—

> ". . . bring him forthwith before the Senate, to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things" referred to in the citation which was in the words of the above quoted Resolution 172 [R. 14].

Manifestly, the Senate was here ignoring the precedent of *Marshall* v. *Gordon*, 243 U. S. 521.

And to emphasize the openly declared intent to exercise exclusively judicial powers in these proceedings the Senate adopted a "mode of procedure and rules"

to govern the trial "in the matter of William P. MacCracken, Jr.," and others "on an order to show cause . . ." On pages 87-89 of the record the Court will find the rules for the trial which the Senate adopted on February 8th. While it was stated by the Senator moving the adoption of the "order" containing "the mode of procedure and rules" that the order provided for "the method which was followed in the recent impeachment case" [R. 89], these rules of procedure differ from those governing trials in cases of impeachment in these striking particulars: (1) Here the Senate presented (after the manner of a grand jury) the charges and then (after the manner of a trial jury) undertook to hear and determine them; while in impeachment proceedings, the charging, or grand jury, function rests solely with the House of Representatives, the Senate having "the sole power to try all impeachments" (Art. 1, Section 3, Par. 6, Constitution); (2) here the Senate constituted its special Senate Air Mail Investigating Committee as its prosecutors of the charges against respondent; in impeachment proceedings Members of the House of Representatives, appointed by it as managers, direct the prosecution; (3) here, after conducting the prosecution, the prosecuting committee were to become members of the trial jury and in executive session vote upon the guilt or innocence of the respondent whose prosecution they had conducted in open session; while in impeachment proceedings when the evidence has been presented and arguments have been made the prosecutors, together with the counsel for the accused, withdraw from the body empowered to decide. Other distinctions to be noted are that no person may be convicted on a bill of impeachment without the concurrence of two-thirds of the Senators present; here there is asserted the power of a mere majority to convict and sentence to imprisonment. In a trial by jury unanimity is neces-

sary. What more forceful argument could be found for denying the power which the Senate asserts in the instant case than that furnished by the distinctions here enumerated?

Of course, it will be ever remembered that the power to bring and try cases of impeachment is expressly conferred (Art. I, Section 2, Par. 5; Section 3, Pars. 6 and 7, Constitution).

We have said that the intention to exercise exclusively judicial powers in this case was openly declared. There was not the slightest disguise in respect of this. In the course of the debate leading to the adoption of "the mode of procedure and rules" [R. 87] for the trial, discussion was had on the provision for the consideration of the case, after evidence had been introduced and arguments made, in a closed rather than in an open session of the Senate, and the Majority Leader of the Senate stated:

> "The only proceedings in closed session, as contemplated by the arrangement, have reference to the deliberation of the Senate. If a jury . . . in attempting to reach a conclusion, should hold their proceedings in open session, there would undoubtedly be influence brought to bear to stimulate obstructions which might prevent agreement" [R. 90, 91].

Senator Johnson asked the Majority Leader—

> ". . . if he likened the proceedings to one of trial by jury, where the jury retire and in executive session determine their verdict"?

The Senator from Arkansas replied—

> "Yes, exactly . . ." [R. 91].

Thus was presented in completely undisguised form the intention of the Senate of the United States, acting as a court and jury, to try a private citizen for a com-

pleted alleged offense for the sole purpose of inflicting punishment as such. To that end, and to no other, was respondent arrested, taken into custody, and deprived of his liberty.

In considering the ensuing discussion we earnestly request the Court to at all times have in mind the emphatic distinction between Senate Resolutions 169 and 172, as above set out.

(3) The Administration of Punishment as Such for a Past and Completed Act Is Criminal Rather Than Civil in Character.

Having thus shown the character of the acts for which the Senate sought to punish respondent and the resolution adopted by it for that purpose, let us now proceed to inquire into their legal significance. A proper beginning would seem to be a consideration of the nature of contempts and the remedy or punishment therefor.

This Court has dealt with this subject in a manner which, we believe, when applied to the facts of this case clearly demonstrates the unconstitutionality of the Senate's action.

In the case of *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, the court dealt with the classification of contempts into "civil" and "criminal" and said, on page 441 *et seq.*:

> "Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' *Bessette* v. *Conkey,* 194 U. S. 329. * * * It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is *punitive,* to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and

many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affrmative act required by the court's order.

* * * * * * * *

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. *Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.*

"It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. *But such indirect consequences will not change imprisonment which is merely coercive and remedial into that which is solely punitive in character, or vice versa.*"

Certain of the statements made in the *Gompers* case are obviously inapplicable to the facts of the present

case, due to the fact that the contempt there under consideration was a contempt of court where parties other than those charged with contempt would be affected by such contempt or the court's action with respect thereto. But the fundamental and basic differences between civil contempt, which results from the wilful refusal to do an affirmative act as ordered by a competent authority, and criminal contempt, which results from the wilful doing of a thing which has been prohibited by an order of such an authority, is applicable and controlling here. A brief reference to the character of the acts for which the Senate sought to punish respondent and the nature of that punishment will serve to illustrate.

Laying aside for the moment any question concerning the so-called Brittin incident with which respondent admittedly had no connection, (but which constitutes petitioner's main factual foundation in his brief here), the act of respondent complained of by the Senate in Senate Resolution 172 was the permitting Givven to take to Hanshue certain papers, which were later returned, subsequent to the service of a subpoena on respondent which commanded him to deliver some of these papers to the Senate Committee. The offense to the Senate charged against respondent is therefore not the refusal to deliver the papers in response to that subpoena as the record fully shows, but rather the doing of an act which might have made impossible compliance with the subpoena itself. In other words, his offense, if any, consisted in failing to hold certain of the papers taken by Givven in readiness so that they might be immediately delivered by him in response to the subpoena if and when he received the consent of his client. To put it most strongly against the respondent it was the doing of something which might by implication be regarded as a prohibited act. Certainly it was not the refusal to do an affirmative act.

Testing the matter again by reference to the nature

of the punishment in view of the admitted facts at the time when the proceedings to enforce this punishment were initiated by the adoption of Senate Resolution 172, the same conclusion must be reached. As heretofore pointed out, there was at this time no pending question, and no document in existence, requested and unfurnished by respondent. Insofar as the incidents under consideration at that time were concerned, the punishment proposed could not possibly have been remedial, either in its purpose or effect. Its only possible object and purpose was *punitive*.

Not only is punishment for crime a judicial function; not only, under our Constitution, is the judicial power sharply separated from the legislative and executive; but it is contrary to the spirit of our institutions to treat anything as a crime, unless it be defined and its punishment fixed beforehand; or to permit imprisonment to be imposed by any branch of the Government, as punishment, except the judiciary. A person charged with crime is to be tried by a court presided over by a judge learned in the law, unbiased as to facts, and responsible to higher authority for failure to follow the usual methods of procedure—either by reversal or impeachment. He is not to be indicted, tried, judged and sentenced by a purely political body of our Government where, after hearing the same evidence and being, presumably, governed by the same rules of law, partisan reasons may result in a division on the questions of guilt and infliction of punishment based almost entirely on party lines; a body responsible to no higher authority for its ignoring of evidence or its disregard of settled law; from which, if the Senate's present position be sound, there is no appeal; against which no bill of impeachment can be brought. If these be not sound propositions then indeed has Government under a written Constitution disappeared from this land.

Nor will it alter the character of the transaction to say that even though designed and intended as a punitive measure, it would also have remedial effects. In the first place, the primary and not the incidental object and purpose is the one which controls the nature of the imprisonment. *Gompers* v. *Bucks Stove & Range Co., supra.* In the second place, the record shows that under the circumstances it could not have had a remedial effect. The offense with which respondent was charged when tested by any standard constituted a criminal contempt.

B.

THE SENATE HAS NO CONSTITUTIONAL POWER TO ADMINISTER PUNISHMENT, AS SUCH, TO A PRIVATE CITIZEN FOR CRIMINAL CONTEMPT OF THAT BODY, OR OTHERWISE.

In vain do we search the Constitution of the United States for any provision authorizing either House of Congress itself to try and imprison a citizen for any offense.

Art. I, Sec. 5, provides that a smaller number than a quorum of each House—

> "may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.
>
> "Each House may determine the rules of its own proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

These are the only provisions of the Constitution giving either House the power of inflicting punishment. Under them that punishment can be inflicted only on a member of the House, and then only for the violation of its rules or the disturbance of its proceedings.

But there are other provisions of the Constitution which clearly safeguard the citizen from such attempts

on the part of either House of Congress as that made by the Senate in this case.

Art. III, Sec. 1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

This Court has said that this means the *whole* judicial power shall be vested in the courts. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 328.

Art. III, Sec. 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury;".

Amendment V: "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

Having shown to a demonstration that respondent was arrested on a warrant of the United States Senate for the purpose of trying him at the bar of that body for an alleged crime, it follows that we have also demonstrated that there were ignored the vital provisions of the Constitution which we have here just quoted.

Heretofore we have considered the character of the petitioner's act, the proceedings of the Senate with respect thereto, and the legal significance of both. In discussing the cases relating to the constitutional power of the Senate to proceed in a manner indicated by Senate Resolution 172, and punish respondent directly as for the commission of an act amounting to criminal contempt without recourse to the courts (and, as a means to that end, to deprive him of his liberty under arrest), we will reserve for later consideration cases of the type of *In re Chapman,* 166 U. S. 661, and *Sinclair* v. *United States,* 279 U. S. 263, which although they deal with the subject of contempt of the Senate, arose in prosecutions under indictments, tried,

under the general criminal law, before juries in a court expressly given jurisdiction by statute; which cases, therefore, do not involve the question of the power of the Senate to proceed against an alleged offender by its own process.

When in this discussion reference is made to the power of the Senate or the House of Representatives, it is to be understood that what is said with respect to the one applies with equal force to the other, "both being on the same plane in this regard." *McGrain* v. *Daugherty*, 273 U. S. 135, 160.

(1) The Decisions of this Court Upon the Subject Establish the Lack of Constitutional Power on the Part of the Senate to Proceed in the Manner Provided by Senate Resolution 172 and Its Trial Rules Adopted for This Case.

At an early date in American constitutional history the contention was made that the power of Congress and either House thereof directly to punish a person not a member for a breach of its privileges amounting to a contempt was a broad power and one which, when formally exercised, could not be the subject of judicial inquiry. This proposition was urged upon the court in the first case on the subject, which is *Anderson* v. *Dunn*, 6 Wheat. 204, decided in 1821.

In this case the sole question presented was whether the House of Representatives can take cognizance of contempts committed against themselves *under any circumstances.*

This Court answered the single inquiry above stated in the affirmative but the case can in no wise be taken as authority for the existance of the broad power to punish for contempt, which when formally exercised, cannot be the subject of judicial inquiry.

In *Anderson* v. *Dunn, supra,* this Court in considering the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, declared it to be "*the least possible power adequate to*

the end proposed," (6 Wheat. 231), which, said Chief Justice White in *Marshall* v. *Gordon, infra,* "was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further than implication would justify." While the narrow point decided in *Anderson* v. *Dunn,* still stands, that case was commented on in *Kilbourn* v. *Thompson,* 103 U. S. 168, "and some of the reasoning of the opinion therein overruled and rejected" (Note, U. S. C. A., tit. 2, Sec. 194, p. 61). Indeed, in *Kilbourn* v. *Thompson* this Court takes up *Anderson* v. *Dunn* and expressly overrules, first, the ruling that the House of Representatives possesses the general power of punishment for contempt; and, second, that its judgment of contempt cannot be inquired into (103 U. S. 197-200).

The next case upon the subject was that of *Kilbourn* v. *Thompson,* 103 U. S. 168, decided in 1881. That case was an action of trespass for false imprisonment brought by Kilbourn against Thompson as Sergeant-at-Arms of the House of Representatives, and grew out of the conduct of Thompson in taking Kilbourn into custody and detaining him in jail pursuant to an order of the House to that effect. Upon his release from such custody by a writ of *habeas corpus,* Kilbourn brought this action. As a plea in bar to the action, Thompson set up the proceedings before the House which resulted in his taking Kilbourn into custody and detaining him.

From this plea it appeared that the House of Representatives had directed an investigation and by subpoena served upon Kilbourn he was ordered to appear as a witness and to bring with him certain records and papers relating to the inquiry. He appeared but refused to answer certain questions. His persistence in such refusal resulted in the custody and detention complained of.

In that case the contention was again made that the power of Congress or either House thereof to punish a

person not a member for contempt was a broad and unreviewable power.

The court took notice of the contention made and the fact that the argument in favor of the existence of such a power rested first, on its exercise by the House of Commons of England, from which it was said we have derived our system of parliamentary law, and secondly, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has expressly conferred upon them.

In answering these arguments, this court pointed out that such power was not expressly conferred by the Constitution and could not possibly be implied from the powers expressly conferred without doing violence to the letter as well as the spirit of the Constitution itself, which, the court observed, was the source of all Federal power of whatsoever nature. Among other things, the court discussed the difference between our legislative system and the English Parliament, observing that that difference had been judicially noticed and applied by the English courts themselves in the case of *Kielly* v. *Carson*, 4 Moore (P. C.) 63.

This court held that while under certain circumstances, either House of Congress has power to deal with an alleged contempt committed by a person not a member, the exercise of such power was expressly limited to cases where such power is necessary to the proper performance of constitutional functions, and that judicial inquiry into the circumstances surrounding the purported exercise of such power was not only contemplated by our constitutional form of Government but was necessary for its preservation.

In holding that the facts set up in the plea did not constitute a bar to the action because the plea itself disclosed that the inquiry of the House and proceedings had thereunder were not legislative but rather judicial in character, the court said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

It was pointed out that the power of Congress itself when acting through the concurrence of both branches, is a power dependent solely on the Constitution, and that such powers as are not conferred by that instrument, either by express grant or by fair implication from such grant, are reserved to the states or the people themselves; that no general power of inflicting punishment was conferred upon Congress by that instrument, and that any such implication was repugnant to other express provisions, such as the due process clause of the Fifth Amendment, which had repeatedly been construed by this court and others of the highest authority as requiring in such cases a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established.

To make what the court evidently regarded as a manifestly clear proposition doubly so, it was pointed out that of course neither branch of Congress when acting separately can lawfully exercise more power than is conferred by the Constitution on the whole body except in response to an express constitutional provision to that effect.

After analyzing the facts and noting the scope of the proceedings by virtue of which Kilbourn had been taken into custody, the court said:

> "The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make, was one that was judicial in its character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it *not* legislative."

But, while the case of *Kilbourn* v. *Thompson, supra,* laid down these principles which we regard as controlling in the present case, it remained for the court in a later case to apply these principles to a situation essentially similar to the present case in its fundamental aspects. That case was *Marshall* v. *Gordon,* 243 U. S. 521, decided 1917.

That case arose on a petition for the writ of *habeas corpus.* Marshall, the United States attorney for the Southern District of New York, had conducted a grand jury investigation which led to the indictment of a Member of the House of Representatives. Prior to the indictment the Member of the House on the floor had charged Marshall with many acts of misfeasance and nonfeasance. After the grand jury had found an indictment against the

Member, he moved, on the floor of the House, that the Judiciary Committee of the House be directed to inquire and report concerning the charges against Marshall insofar as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the sub-committee and the office of the District Attorney, Marshall, based upon the assertion that the sub-committee was seeking unlawfully to penetrate the proceedings of the grand jury. While the sub-committee was conducting its hearings in New York, Marshall addressed a letter to its chairman charging that the sub-committee was endeavoring to investigate and frustrate the action of the grand jury, rather than to investigate the conduct of the District Attorney, averring that these charges, which Marshall had theretofore given to a newspaper reporter, were true, and "repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the sub-committee but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt by the chairman of the sub-committee. The judiciary committee reported the matter to the House and a select committee was appointed to consider the subject. The district attorney was called before that committee and reasserted the charges made in the letter, averring that they were justified by the circumstances and stating that they would under the same conditions be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows (243 U. S. 532):

> "'We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the sub-committee of the Judiciary Committee of the House of Representatives, on March 4, 1916 . . ., is as a whole and in

several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.'

"Upon the adoption of this report under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant-at-Arms in New York was followed by an application for discharge on *habeas corpus* . . ."

The District Court discharged the writ and remanded Marshall to the custody of the Sergeant-at-Arms, and the case was brought on direct appeal to this Court to review the correctness of that action.

After reviewing the facts, the court said (p. 532):

"Whether the House had power under the Constitution to deal with the conduct of the District Attorney in writing the letter as a contempt of its authority and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the statutory modes of trial provided for criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us."

Having thus stated the question before the court, the Chief Justice added that the court would proceed to meet and dispose of the issue as *one of first impression.*

Certain it is, said the court—

"that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment including the right to fix a long term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legis-

lative and judicial authority possessed by the Parliament. . . ."

But the court, after noting that in this country prior to the formation of the Federal Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized, and the necessity of separating the two was felt, declined to accept the argument that either House of Congress had such authority and said (p. 536):

> "No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, Par. 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. . . . Whether the right to deal with contempt in the limited way provided in the State Constitutions may be implied in Congress as a result of the legislative power granted, must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach."

On the subject of the nature and extent of this limited power, the court said (p. 541):

"What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted."

Concerning the right of the House of Representatives to punish for contempt as punishment, the court said (p. 542):

"Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that *it does not embrace punishment for contempt as punishment*, since it rests only upon the right of self-preservation, that is, the right to *prevent* acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to *compel* in order that legislative functions may be performed."

And the court follows this with the statement (p. 542):

"Not only the adjudged cases but congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated. Take for instance the statute* referred to in *In re Chapman* where, not at all interfering with the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other."

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* See Appendix.

Proceeding with a review of the legislative history of the exertion of the implied power to deal with contempt by the Senate or House when viewed comprehensively from the beginning, the court says that that history—

> "points to the distinction upon which the power rests and sustains the limitations inhering in it which we have stated."

Referring to the "principal instances" of the exertion by either House of Congress of the implied power to deal with contempt, collected in the margin of the report of *Marshall* v. *Gordon* at page 543, the court states of them that—

> "they all except two or three deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or *finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.* In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten, that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the

> concrete result manifested by considering the subject from the beginning. *Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law.*" (pp. 543-4.)

Learned counsel for petitioner here observe (brief, p. 16) that in *Marshall's case* the Court pointed out that the legislative history of the exertion of the implied power "to deal with" [not *punish for*] contempt shows that some principal instances dealt with "contumacy in refusing to obey orders to produce documents or give testimony," but apparently overlooked what the court said in that regard in the sentence just italicized.

The opinion continues—

> "So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, *or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration.*" (p. 544.)

After considering the acts then sought to be punished as a contempt of the House directly by that body, exercising its "implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed", and concluding that those acts were not of such a character as to bring them within the implied powers, as properly understood and limited, for the reason that there was room only for the conclusion that the contempt was deemed to result from the writing of the letter and not

because of any obstruction to the performance of legislative duty resulting from the letter, "or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the Committee and of the House generally", the court pointed out that

> "to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject." (p. 546.)

And in the instant case the claim that the Senate has power to inflict punishment as punishment "to vindicate its authority" is "confidently" rested upon the case from which these quotations are made!

This court was at pains, in the *Marshall Case*, to state that the effect of its holding was not in any way to interfere with the right of Congress by general legislative enactment to make criminal conduct which it deemed contemptuous. Congress has the undoubted power so to do, but under such legislation the determination of the guilt or innocence of any person so accused must be tried by a judicial tribunal in the manner contemplated by the due process clause of the Fifth Amendment of the Federal Constitution. Said the court (p. 546):

> "But these considerations plainly serve to mark the broad boundary line which separates the limited implied *power to deal with* classes of acts as contempts for self-preservation and the comprehensive legis-

> lative *power to provide by law for punishment* for wrongful acts."

In the instant case it is, we submit, perfectly patent that the Senate now asserts on the ground of necessity the existence of practically the full power belonging to the House of Lords, though this Court has distinctly held that it has no such power by express grant or by analogy to that body.

We submit that the decision in *Marshall* v. *Gordon,* a decision neither weakened nor destroyed in any subsequent case, clearly holds that while each House of Congress may have all power, by removal from its halls, and by coercive imprisonment, necessary to enable it to perform its constitutional duties, it is absolutely without power itself to impose punishment for a past act, which it may regard as contemptuous or a breach of its privileges. For such offenses punishments must be inflicted by the courts, as for other crimes, and under the safeguard of all constitutional provisions.

This is not to say that there is no power to continue to deal with contemptuous conduct to prevent its continuance or immediate obstructive recurrence. The power so to deal and the limitation thereof are made crystal clear in the Chief Justice's opinion in the *Marshall case.* In *Kilbourn* v. *Thompson,* 103 U. S. 168, this Court (page 182, *et seq.*), gave emphatic and unqualified approval to the decision of the privy council in the English case of *Kielley* v. *Carson,* 4 Moo. P. C. 63. In *Marshall* v. *Gordon, supra,* this Court again refers at length to *Kielley* v. *Carson* and gives unqualified approval to the principal point there decided, namely, that the ancient power of the British Houses of Parliament to inflict punishment, as such, for contempts or other offenses, did not exist in such legislative bodies as the Houses of Congress of the United States. This Court however reserved for further discussion the comprehensive holding of

Kielley v. *Carson* to the effect that there could in no case exist in the legislature the power of punishing any one for any past misconduct as a contempt of its authority. Coming to that discussion, Mr. Chief Justice White, in the *Marshall* case, after stating, as we have already pointed out, that the court had "been able to discover no instance", except two or three theretofore referred to, "where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration", said (pp. 544-5):

> "And this latter statement causes us to say, referring to *Kielley* v. *Carson, supra,* that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to *prevent immediate recurrence,* that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the

> reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

And upon that part of *Marshall* v. *Gordon* just quoted petitioner here "confidently" relies. We submit that it is not possible, with any show of soundness, to argue in this case that the act of respondent, for which the Senate asserted the right to try and punish him, was of such a character as to permit it reasonably to be determined, in the use of legitimate and fair discretion, that there was "*necessity for repression to prevent immediate recurrence,*" that is to say, the continued existence by respondent of any interference or obstruction to the exercise of the legislative power. No tenable argument can possibly be made, we earnestly insist, to uphold the contention that, after the papers subpoenaed by the Senate Committee which had been taken from respondent's office by Givven had been returned and produced before and delivered to that Committee, the Senate, or any one else, could legitimately and fairly conclude that there was "necessity," in proceedings which were not even commenced until after everything that could be done with respect to the documents had been done, to punish in order to prevent immediate recurrence of respondent's act. The *limit* of the power of the Senate, "when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority," *is "necessity for repression to prevent immediate recurrence"* when "from the nature and character of the act" it can be legitimately and fairly concluded that "*immediate recurrence,* that is to say, the *continued* existence of the interference or obstruction to the exercise of the legislative power," is to be expected.

Petitioner's sole reliance for the sustaining of the asserted power of the Senate to inflict punishment, as such, is that part of *Marshall* v. *Gordon* which we have last quoted and discussed. We submit that so far from

supporting petitioner here the carefully limited exception to the general rule which the Court points out destroys petitioner's contention.

We have made it plain, we are sure that we recognize as settled the doctrine that each House of Congress in the performance of the legislative function must have some power of self help. We think, however, that the line of demarcation between that power, the power of self help or self preservation, and the power asserted in the instant case, is logical and plain, and is easily ascertainable from the reported cases. Obviously Congress as a deliberative body, passing laws upon careful consideration, has the right to preserve peace and decorum in its deliberations, to compel attendance of its members, to admit them to membership and to expel them, and to punish them for disorder; to keep order in the halls of Congress and to that end to eject any one disturbing its deliberations, and to seize and hold him until he may be turned over to the proper authorities for trial and punishment if he has violated any law; and, as to witnesses, to force a witness to attend before either House, or any committee thereof, and to testify, or produce, under proper subpoena, material documents, and, as a means to that end, to coerce him by imprisoning him until he does attend and testify or produce.

As to a witness, should he fail, when properly called upon to do so, to answer pertinent questions or produce material documents, the Senate (or House) in the exercise of the power to compel testimony may arrest and commit him, but such restraint cannot be made to extend beyond the time when the witness should signify his willingness to testify; such a witness can be held in custody so long as, but no longer than, he signifies his willingness to testify, or produce documents properly called for, and does testify or produce. For the offense committed by the past refusal to testify or produce the penalty or punishment remains controlled by the general criminal law (see

page 544, 243 U. S.). So long as he refuses to comply with lawful demands and is imprisoned, the recusant witness, of course, suffers punishment, but it is not inflicted as such; it is merely incidental to the power to coerce the witness. This is not punishment in the legal sense; this is not the "infliction of punishment, as such." And it is the power to inflict "punishment, as such," that is asserted in this case.

Difficulty is not encountered in seeking for an illustration of an act which though completed is of a nature and character to indicate, "in the use of legitimate and fair discretion," "the necessity for repression to prevent immediate recurrence." If during the deliberations of the Senate a private citizen occupying a place in one of its galleries so conducts himself as to disturb those deliberations, the mere fact that when the Sergeant-at-Arms, acting upon the order of the presiding officer, reaches that citizen he has ceased the disturbing act, does not deprive the Senate, acting through its Sergeant-at-Arms, from taking him into custody and ejecting him; nor does it deprive the Senate from holding him in custody for such period of time thereafter as may be necessary to await the arrival of the proper authorities to whom the Sergeant-at-Arms may be directed to turn him over for trial and punishment for his disorderly conduct. If that period of custody might be called punishment for a completed act of misconduct, it is obviously incidental to and necessarily results from the power to take the disorderly person into custody and to hold him in that custody to prevent immediate recurrence of that conduct of his which interfered with or obstructed the exercise of the legislative power. Thus far and no farther can either House go in any case of a private citizen charged with the commission of an act contemptuous of its power or infringing its privileges. That this case is not within the class in which that limited power might be exercised is, we submit, too clear to call even for the argument we have expended upon it.

By way of summary, the Chief Justice in his opinion in *Marshall* v. *Gordon* used language which we submit contains the essence of all arguments which could then or can now be made on the subject. That language was as follows (p. 546):

> "The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in state constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a *system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted* and secure their free exertion *and yet at the same time not substantially interfere with the great guarantees and limitations concerning the exertion of the power to criminally punish,*—a beneficient result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted."

As we have already pointed out, nothing that we here argue is to be, or can be, construed as contending that the efficiency and dignity of Congress have not been or cannot be amply protected. Existing law (Secs. 102-104, and Sec. 859, Revised Statutes),* enacted by both Houses, and approved by the Executive, would seem ample to provide for that protection. But if anything be lacking, there is still a vast reservoir in Congress to make provision therefor by law (Art. 1, Sec. 8, Par. 18.) And this point is made clear near the conclusion

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* See Appendix for these statutes.

of the opinion in *Marshall* v. *Gordon* where the court said (p. 548):

> "We repeat, out of abundance of precaution, we are called upon to c o n s i d e r *not the legislative power of Congress to provide for punishment and prosecution under the criminal laws* in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends."

In *Marshall's* case it was suggested "in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings." After stating that that argument was irrelevant because the premise upon which it rested was unfounded, this court said (p. 547):

> "But indulging in the assumption to the contrary we think it is wholly without merit as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can

this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *In re Chapman, supra,* were distinct and did not therefore the one frustrate the other—*the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so*—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other."

We now come to the case of *McGrain* v. *Daugherty,* 273 U. S. 135. In that case a select committee of the Senate was formed pursuant to a resolution to investigate the administration of the Department of Justice. Daugherty was served with a subpoena commanding him to appear before the Committee for the purpose of giving testimony bearing on the subject under investigation, and to bring with him specified books. He failed to appear. A second subpoena was served on him commanding him to appear for the purpose of giving testimony—nothing being said in this subpoena about bringing books and papers. He again failed to appear; and no excuse was offered by him for either failure. The Committee reported the facts to the Senate which adopted the following resolution:

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper. Therefore be it

"Resolved, That the President of the Senate *pro tempore* issue his warrant commanding the Sergeant-at-Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter un-

> der inquiry as the Senate may order the President of the Senate *pro tempore* to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate."

It will be observed that the resolution in the *Daugherty* case and the *first* resolution [Senate Resolution 169; R. 76-7] directing the arrest of respondent in this case are substantially alike.

The warrant was issued agreeably to the resolution. Daugherty was taken into custody under it. Thereupon he petitioned for a writ of *habeas corpus,* which was granted. After hearing, the District Court discharged Daugherty from custody, and the case came here on direct appeal.

After stating that the case had been given "earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy," this Court stated that the questions in that case were (p. 154):

> "(a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, *to compel* a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) *whether* it sufficiently appears that *the process was being employed in this instance* to obtain testimony *for that purpose.*"

After stating, as above quoted, the principal questions presented in *Daugherty's Case,* and disposing of certain minor questions, irrelevant here, this Court pointed out that the court was not, in the then state of that case (p. 160)—

> "now concerned with the right of the Senate to propound or the duty of the witness to answer

> specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate —which for present purposes must be assumed."

Here again we emphasize that that case solely concerned the power to arrest a private citizen and bring him before the bar of the Senate, there to be interrogated and required to answer questions pertinent to an inquiry being properly conducted by the Senate.

The entire decision in *McGrain* v. *Daugherty* is, we submit, found in three brief quotations:

> 1. "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function" (p. 174.)
> 2. "We are of opinion . . . when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes" (p. 177.)

And—

> 3. "We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; *that the Senate is entitled to have him give testimony pertinent to the inquiry,* either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment" (p. 180.)

Clearly this Court in *McGrain* v. *Daugherty* did not in any sense, either by statement or as a result of its holding, qualify the principles of law established in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon.* Clearly, also, those cases establish the proposition that the

Senate has no constitutional power to administer criminal punishment as such whether for an act amounting to a contempt of that body or otherwise.

(2) The Cases Involving Proceedings Under the General Criminal Law to Punish for Contumacy or Conduct Amounting to Contempt Do Not Controvert but Admit the Accuracy of the Rule Contended for by Respondent.

Cases of the type of *In re Chapman*, 166 U. S. 661, and *Sinclair* v. *United States*, 279 U. S. 263, are in no way inconsistent with the proposition which we submit is established by the cases which involve direct action against a person not a member alleged to have been in contempt of the privileges of either House or its application to the facts of the present case.

On the other hand, these cases show the correctness of the position taken by respondent before the Senate itself and the courts below, namely, that while restraint or imprisonment which is remedial and coercive in nature is embraced within the implied power of either House, if in aid of a legislative purpose, punishment as such for the purpose of vindicating the authority of such a body is properly a function for the court pursuant to the general criminal law (Revised Statutes, Secs. 102-104).*

In the *Chapman* case, the inquiry was conducted under a resolution of the Senate and related to charges published in the press that Senators were yielding to corrupt influences in the consideration of a tariff bill then before the Senate and were speculating in stocks the value of which would be affected by pending amendments to the bill. Chapman appeared before the committee in response to a subpoena, but refused to answer questions pertinent to the inquiry. His refusal to answer was certified to the United States Attorney for the District of Columbia and he was indicted and convicted under section 102 of the Revised Statutes. After the

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* Appendix.

taking of certain other procedural steps, he secured leave and filed a petition for *habeas corpus* directly in this Court, in which he attacked the constitutionality of sections 102 to 104 of the Revised Statutes under which he had been convicted.

In disposing of the first question in the case, this court held the questions which had been propounded were pertinent to the inquiry, and it is obvious from an examination of the case that the court was impressed by the fact that the matter under investigation at the time of the contumacious conduct of Chapman was a matter peculiarly legislative in character, in that it involved charges of corrupt conduct of certain members of the Senate in connection with legislation then pending before it. It was pointed out that under the Constitution the Senate had, among other things, the power to punish its members for disorderly behavior and, with the concurrence of two-thirds, to expel the member. From this it was concluded that the investigation was necessarily legislative in character in that it pertained to the organization, conduct, and personnel of that branch of the legislative department. After holding that the questions propounded were pertinent to the inquiry, this Court said (p. 671):

> "The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course constitutes a contempt of that body, and by the statute this is also made an offense against the United States."

Chapman's next contention was in the alternative; first, that the statute in question delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases, or secondly, if it be interpreted as leaving in the

Houses the power to punish such acts and vesting in addition jurisdiction in the court to punish the same acts as misdemeanors, then the law was invalid because subjecting recalcitrant witnesses twice to be put in jeopardy for the same offense contrary to the Fifth Amendment.

In rejecting this contention, the court pointed out that the statute in question did not have the effect of divesting either House of its power to punish directly for contempt in proper cases, but that it was also proper for the Congress, by concurrent action of both Houses, to make such conduct a misdemeanor against the United States. Here the court recognized in its holding and decision, although it did not expressly state, the inherent differences between punishment as such, a function of the courts, and punishment as an incident to the exertion of the power to coerce or restrain in aid of the performance of a legislative function. The recognition of this distinction is all that is insisted upon in the present case. And, as we have seen, in *Marshall* v. *Gordon,* the court expressly points out that such is the result of the decision in *In re Chapman* (243 U.S. 542, 547).

Sinclair v. *United States, supra,* involved a judgment of the Supreme Court of the District of Columbia sentencing Sinclair, under section 102 of the Revised Statutes,* for refusing to answer questions propounded to him by a committee of the Senate, during the conduct of an investigation made pursuant to resolutions which, as extended and amended, stated that one of its objects was to "ascertain what, if any, other additional legislation may be advisable, and to report its findings and recommendations to the Senate."

Sinclair's refusal to answer the questions was based upon the contention that since the Congress had authorized and directed the filing of suits by the Government for the

*Appendix.

purpose of cancelling the leases, which were the subject of the inquiry, since his previous appearance before the committee, he should not be required to divulge information which would be relevant under the issues then pending in judicial tribunals as a result of these Government suits.

In affirming the judgment of the trial court, this Court pointed out that the pendency of the suits to cancel the leases was a thing separate and apart from the power of the Senate to compel the giving of testimony which was proper and relevant to a legislative inquiry which was then in progress pursuant to a resolution to that effect. No question of any action of a remedial or coercive nature, was involved in the *Sinclair* case. And, of course, neither was any question of the power of the Senate directly to administer punishment involved. The existence of such a power was not for an instant asserted in that case. The act of Sinclair in refusing to answer pertinent questions was certified by the Senate to the District Attorney for action in a judicial tribunal. The action taken there was clearly intended as a vindication of the authority of the Senate and to inflict punishment—and hence the case was brought under the applicable criminal law and in a court of competent jurisdiction under that law.

We are thus brought again to the basic and fundamental differences between the *Chapman* and *Sinclair* cases and the present case, namely, first, that both of these cases involved contumacious conduct by witnesses who refused to answer questions propounded to them in proceedings which the court held were legislative in purpose; second, that neither case involved an attempt upon the part of Congress or either House thereof directly to punish a person not a member for conduct amounting to contempt, but on the other hand involved actions under the general criminal laws.

Manifestly, each of the above considered cases is wholly consistent with the position taken by respondent,

both before the Senate and the courts below. The *Chapman* case particularly recognizes and applies in its holding and decision the basic and fundamental difference between punishment as such and punishment which is merely an incident to a coercive measure. And this is twice pointed out in *Marshall* v. *Gordon,* 243 U. S. 521, at pages 542 and 547.

(3) The Cases Relied Upon by Petitioner Do Not Controvert but Admit the Accuracy of the Rule Contended for by Respondent.

The case of *Henry* v. *Henkel,* 235 U.S. 219, is cited by the petitioner for the proposition that the scope of the hearing before the lower court was confined to the single question of the jurisdiction of the Senate under whose authority respondent was held. We take no position at variance with the doctrine of *Henry* v. *Henkel.* But the learned counsel for the petitioner attempts to press it to the point of denying judicial inquiry in *habeas corpus* proceedings into the power of the Senate to deprive a private citizen of his liberty when the particular facts of the case disclosed that that power had been exceeded. Such is not the law.

In *McGrain* v. *Daugherty,* 273 U. S. 135, at pages 175-6, the Court said:

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. . . . We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

And obviously in such a case the only procedure open to the witness so refusing, in the event his refusal is followed by arrest or commitment, to secure his release, would be the writ of *habeas corpus.*

Again in *Sinclair* v. *United States,* 279 U. S. 263, at pages 291-2, the Court, referring to its decision in *McGrain* v. *Daugherty,* said:

> "And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry."

It is too obvious to require more than stating that a consideration of the facts of the case is essential to a determination of the question whether or not power has been exceeded.

The case of *McGrain* v. *Daugherty, supra,* is cited by petitioner to the proposition that the petition for *habeas corpus* shows upon its face that the Senate was exercising a legislative function in subpoenaing respondent and requiring him to produce documents before it, and that therefore the jurisdiction of the Senate is undisputed.

The material and essential facts of the case of *McGrain* v. *Daugherty,* as well as the scope of the court's holding in that case, have been dealt with hereinbefore. The inapplicability of that case as a precedent for petitioner here was made obvious in that discussion. There we conceded, as we conceded below, and again concede here, the right of the Senate to compel the attendance and response of a contumacious witness if the proceedings in which his testimony is desired are in furtherance of the exercise of a valid and constitutional power; if the purpose is legislative in nature. Here, however, the record affirmatively discloses that while the Senate may have been originally

engaged in the performance of a legislative act, there was a clear and manifest digression from the performance of a proper and constitutional function to one which was improper and unconstitutional. Senate Resolution 172 and the proceedings had thereunder were in no sense either legislative or remedial in character. The respondent here was taken into custody for the sole purpose of punishing him for a past and completed act, punishment which, if administered, could not possibly have remedial, preventive or compelling effects or consequences.

The case of *Marshall* v. *Gordon, supra,* is cited by petitioner. The particular language in the opinion in that case relied upon by petitioner here has been quoted and discussed by us hereinbefore (*ante, pages* 26-35). There, we submit, we completely disposed of that case as an authority for petitioner and showed to a demonstration that its doctrine unescapably supports the decision which the Court of Appeals rendered.

The language in the Chief Justice's opinion in *Marshall* v. *Gordon* upon which petitioner relies (243 U. S. 544-5), when fairly and properly construed can in no way be taken as a justification for the Senate's action in this case. As we have heretofore shown, there was not only no probability of respondent in this case again engaging in conduct of a similar nature which would be offensive to the Senate; there was no possibility of his doing so because, at the time of the adoption of Senate Resolution 172, all papers and documents which had ever been in his possession, save and except those involved in the Brittin incident, were in the possession of the Senate, and as to those involved in the Brittin incident—(a) their destruction was a known and accomplished fact; and (b) it is conceded in this case that respondent neither participated in, nor had knowledge of, that act [R. 7-8; Exs. E and F. pp. 31-32; 57-67]. In view of this record, we respectfully submit that there is no justification for the repeated statements in petitioner's brief that respondent "secreted" or "de-

stroyed", or connived at, or was in any way connected with, the "secretion or destruction" of papers covered by the subpoena; or that there was a "secretion or destruction" of any such papers of which he even had knowledge. Furthermore, as the testimony of Post Office Inspector Bradley, referred to in the brief and made an appendix thereto, dealt exclusively with conduct of Brittin—which, we cannot too often repeat, respondent did not participate in, was not connected with, and, at the time of the occurrence, had not the slightest knowledge of [R. 7, 31-32; 58-59; 60; 67],—it is obviously without relevance to any issue in this case and the purpose of its attempted importation into the record, of which it is no part, is not made clear in petitioner's brief. There is not, and never has been, any dispute with respect to the facts just above stated. The demurrer admits the unqualified allegations of these facts. The Bradley testimony in no way contradicts them in any detail. There is nothing whatever in the Bradley testimony which connects, or attempts to connect, respondent with the papers referred to by Inspector Bradley. Hence the irrelevancy of that testimony, now for the first time lugged into this case under the claim that because the report thereof has been incorporated in a public document this Court takes judicial notice of the facts testified to by the witness; a claim which, in the circumstances, it is not necessary to discuss. Certainly our distinguished opponents will not here argue that, assuming there was anything wrong in the action of respondent's partner, Lee, in allowing Brittin access to the files of his own papers, the Senate could hold respondent in contempt because of *that* wrong, or that respondent could in any tribunal be penalized therefor.

Once again, concededly, respondent had no connection with the Brittin incident; it has never been heretofore argued that he had; it cannot truthfully be charged or fairly argued that he had. Upon that incident the Senate

could no more base the right to hold this respondent in contempt than it could hold in contempt one who had never been summoned to appear before its Committee or one who, having been so summoned, declined to answer questions manifestly not pertinent to the inquiry. [*McGrain* vs. *Daugherty*, 273 U. S. 175-6; *Sinclair* vs. *United States*, 279 U. S. 291-2.]

To return to *Marshall* vs. *Gordon* (from which we were diverted by our discussion of the indirect attempt to lay the Brittin incident at the door of respondent), the language of this Court in that case relied upon by petitioner here merely means that even if the offense originally committed was the doing of an act which had been prohibited by a competent authority, punishment could still be administered which would be civil and remedial in character if, in the exercise of a fair discretion, the tribunal affected could determine from the circumstances that unless restrained or otherwise punished the offense would be *immediately* repeated, to the continued or further interference of the proceedings. To hold otherwise would be to ignore entirely the essential differences between civil and criminal contempts and the objects and purposes of punishment therefor which have been recognized by all the authorities, at least since the decision of this Court in the case of *Gompers* v. *Bucks Stove & Range Co.*, *supra*.

In discussing the case of *Marshall* v. *Gordon*, petitioner while contending that the Senate has the power to punish a private citizen for acts which are in no way interfering with any legislative function at the time the power to punish is exerted, and, in respect of which, at that time, there is no possibility of immediate, or even remote, recurrence, nevertheless admits that the asserted power "*is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred.*" [Brief, p. 21].

If, as petitioner contends, the Senate has the power to administer punishment as such, then, we ask, Why is

this punishment confined to imprisonment only? Why has not the Senate the power to punish by fine or by both fine and imprisonment? If the Senate may impose a sentence for the definite period of ten days, why can it not impose one of ten months or two years? And lastly, why can not the imprisonment extend beyond the session?

If petitioner's contention is correct then the Senate would have the power to do all of the things suggested in the above questions. But, petitioner admits that the Senate has no such powers. Why? The rule can be no broader than the reasons which give rise to it. The reason that the Senate can do none of the things suggested in the above questions is because its power is remedial and coercive only. As the courts have said, the party imprisoned may at any time recant and therefore there is always in his possession the key to his prison. Hence, as conceded, [Petitioner's brief, p. 21] "the power 'is limited to imprisonment' ". It is for the same reason that the Senate can not imprison beyond the session in which the contempt occurred [Petitioner's brief, p. 21] because to do so would nullify the above-stated rule. As soon as the Senate adjourns the prisoner is deprived by the Senate's own action of the opportunity to recant, thereby opening his prison door, and, therefore, it necessarily follows that upon adjournment the prisoner must be released. None of this would be true if, as insisted in this case, the Senate—not to compel, to coerce, but—has the constitutional power to punish by imprisonment for a definite period by it prescribed. We submit that the concession made in the quoted matter, at the foot of page 21 of petitioner's brief here, destroys his entire case—and that concession but quotes the law as settled by this Court.

Petitioner also relies on the cases of *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, and *ex parte Grossman*, 260 U. S. 87.

The first of these cases, while dealing with contempt,

deals with an act alleged to be in contempt of a judicial tribunal.

While this court in that case recognized that the method of proceeding against one in contempt of either legislative or judicial tribunals was essentially similar, if the power to proceed at all existed, there is nothing in that case which affords justification for the exercise by a legislative body of judicial functions such as is here involved. In the course of its opinion the court repeatedly took occasion to observe the differences between judicial functions and legislative functions which were set out in the case of *Marshall* v. *Gordon*. There it was said (p. 418):

> "While the *Marshall* case concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable, *to the extent that they may not be inapposite because of the distinction between legislative and judicial power*. Indeed the identity of the constitutional principles applicable to the two cases, *subject to the differences referred to* was pointed out on pages 542 and 543, where it was said: 'So also when *the differences between the judicial and legislative powers are considered* and the divergent elements which in the nature of things enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law."

In the teeth of this decision specifically recognizing the *differences* between the judicial and legislative powers to punish for contempt the petitioner in his brief (p. 25) in referring to this decision says:

> "Here this court holds that the principles applicable to the legislative and judicial power to punish summarily are *identical* * * *"

Such a statement is conclusive evidence of a misunderstanding of the rule of that case and an attempt here to justify the threatened action of the Senate by imputing to the language of this Court, used in a former case, a meaning which is clearly not only not conveyed but expressly excluded.

The acts of Marshall complained of in *Marshall* v. *Gordon*, and of the editors of the Toledo News Bee, charged as contempt in *Toledo Newspaper Company* v. *United States*, were strikingly similar. Yet this Court held that the legislative body could not punish Marshall, but that the judicial body could punish the newspaper editors: a clear recognition of the fundamental difference between the legislative and judicial power to inflict punishment, as punishment, for contempt.

The case of *ex parte Grossman, supra,* involved the power of the President to pardon a criminal contempt committed by disobedience of an injunction issued by a District Court in pursuance of the prohibition law. After a detailed examination into the authorities concerning the power of Executive pardon, this Court decided that inasmuch as the contempt there involved was a criminal, as distinguished from a civil contempt, that the executive had such power. This case not only falls short of being an authority for petitioner's position, but, on the contrary, clearly recognizes and applies the difference between civil contempt and criminal contempt as pointed out in the case of *Gompers* v. *Bucks Stove & Range Company, supra,* and upon which respondent here relies.

C.

THE MAJORITY OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FULLY RECOGNIZED AND APPLIED THE LAW AS ESTABLISHED BY THE DECISIONS OF THIS COURT TO THE FACTS IN THIS CASE.

We believe that in our treatment of the cases we have established the following propositions with respect to the constitutional power of the Senate in such cases.

1. That the power of the Senate to deal directly with

the conduct of a person not a member alleged to have committed a contempt against that body is an implied and necessarily a limited power.

2. That the purported exercise of that power under the circumstances of a particular case is not only a legitimate field for judicial inquiry, but contemplated by our constitutional form of government.

3. That such power cannot be exercised by the legislative branch of our Government or either House thereof when the purpose of such exercise is the administration of punishment as such rather than as an aid in the performance of a proper legislative function.

The application of these principles to the facts of the case at bar is at once manifest, the result self-evident.

We have heretofore shown that the respondent's acts were completed acts; that if he had committed any offense, it was by the doing of an act which had been prohibited by the Senate through the service of its subpoena; that there was not only no likelihood but there was no possibility of a repetition of the conduct which was obnoxious to the Senate; and that what had been done *by him,* innocently or otherwise, had been undone and therefore could not be in any way affected by any punishment which could be meted out to him. We have also shown that the Senate in Senate Resolution 172 did not even attempt to disguise the fact that the punishment proposed by it was not to aid in the performance of a legislative function; it was in no sense remedial.

Under the rule of the *Gompers* case, the offense, if any, would have constituted criminal contempt if the authority of a court had been involved. Can it be otherwise because the tribunal affected was legislative rather than judicial? Other than a negative answer would ignore the rule as well as the basis therefor (*Gompers* v. *Bucks Stove & Range Co., supra; Kilbourn* v. *Thompson, supra*).

Can the guilt or innocence of a person charged with the commission of acts which, if established, would make him guilty of a criminal contempt, be tried in other than "a

tribunal appointed by law," which tribunal is to be "governed by rules of law previously established"? The due process clause of the Fifth Amendment, as interpreted in the cases of *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon,* as well as many other cases, says that it cannot. Moreover, we have the statement in *Marshall* v. *Gordon* that legislative tribunals have not heretofore attempted to exercise such power, save in a few cases wherein the distinction between judicial and legislative power were forgotten or "for the moment" overlooked.

If the power asserted by the Senate in this case exists, what has become of the constitutional separation of powers which this Court, in *Marshall* v. *Gordon,* described as "interwoven in the fabric of our constitution"?

We respectfully submit that an examination of the majority opinion of the United States Court of Appeals for the District of Columbia discloses that each of these questions was fully weighed and considered and that the answers thereto were given in a manner which is compelled by the decisions of this Court upon the subject.

The dissenting opinion below fails to recognize and apply these principles but on the contrary holds in effect that the desire of the Senate affected by an act which it regards as a contempt of its authority is in and of itself a justification for the exercise of the power to punish directly and as punishment; another statement of the "necessity" doctrine urged first upon this Court in the case of *Anderson* v. *Dunn* and reiterated in the case of *Kilbourne* v. *Thompson* and rejected flatly in that case and in *Marshall* v. *Gordon.* It fails utterly to recognize the fundamental distinction between the power of Congress, in its discretion, to make particular acts punishable under the general criminal laws accompanied by the power of either House in such cases as affect it to direct the proper enforcement officers to proceed thereunder, and the lack of power of either House to inflict punish-

ment as punishment directly for acts constituting contempt of its authority.

D.

CONCLUSION.

More than half a century ago this Court in the case of *Kilbourn* v. *Thompson, supra,* commented on the scope and effect of the three primary articles of the Constitution and the division of all Federal powers accomplished thereby to the Executive, the Legislative, and the Judicial Departments. There, after stating that it necessarily followed from this division that the powers confided by the Constitution to one department cannot be exercised by another, the Court said (103 U. S., at 191-2):

> "It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of the States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

The basic division of constitutional powers and the underlying reasons for the encroachment of one department upon the functions of another are the same now as then.

That the decision of the United States Court of Appeals for the District of Columbia should be affirmed is—

Respectfully submitted,

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Washington, D. C.,
January 2, 1935.

APPENDIX

The following sections of the Revised Statutes were derived from an act of January 24, 1857, entitled "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony." 11 Stat. 155, c. 19.

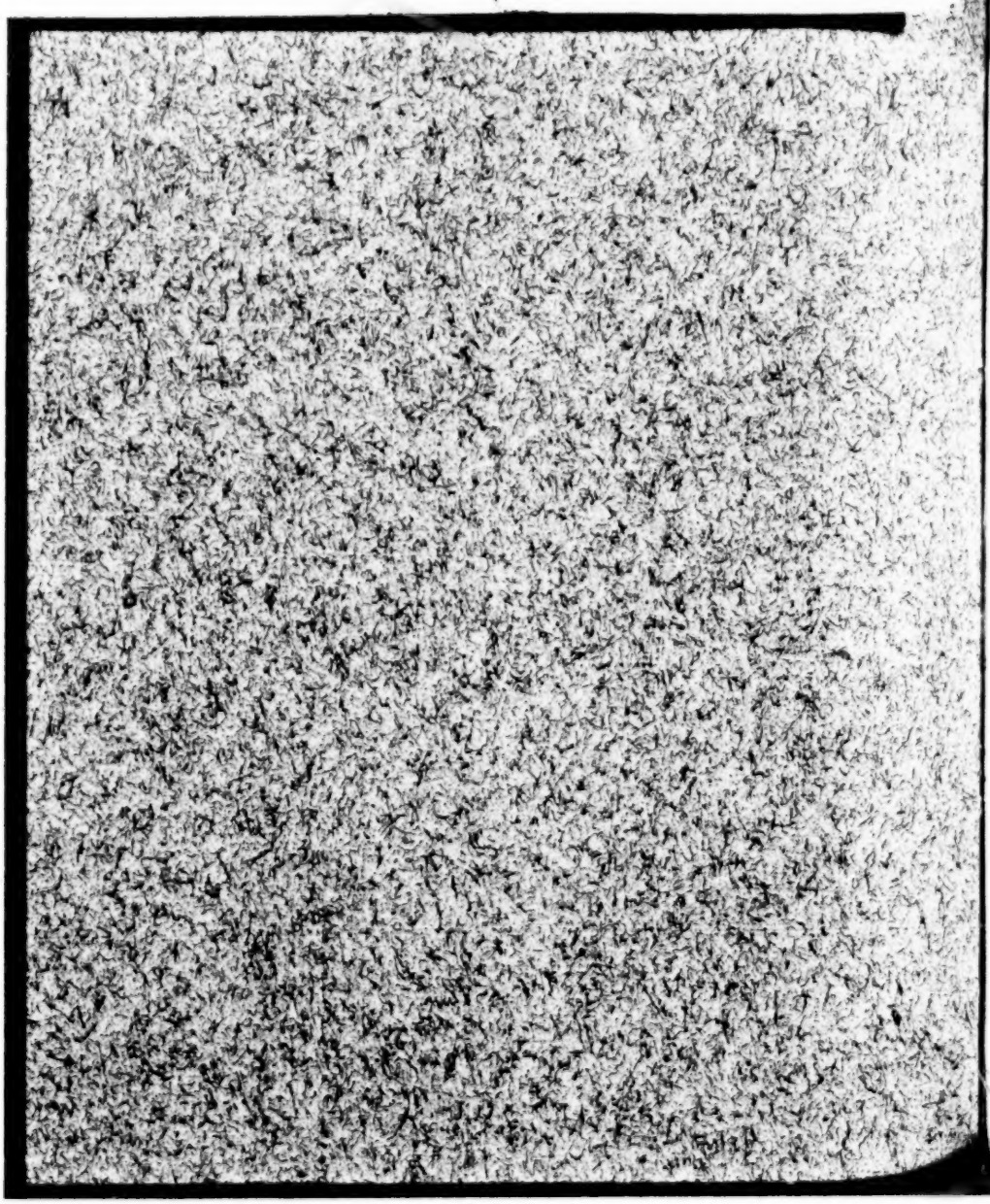
"Sec. 102. Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

"Sec. 103. No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

"Sec. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

"Sec. 859. No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

OPINION



SUPREME COURT OF THE UNITED STATES.

No. 339.—October Term, 1934.

Chesley W. Jurney, Petitioner, vs. William P. MacCracken, Jr. } On Certiorari to the United States Court of Appeals for the District of Columbia.

[February 4, 1935.]

Mr. Justice Brandeis delivered the opinion of the Court.

This petition for a writ of habeas corpus was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr. against Chesley W. Jurney, the Sergeant-at-Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District with directions to discharge the prisoner from custody. 72 F. (2d) 560. This Court granted certiorari because of the importance of the question presented. 293 U. S. —.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The Resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an enquiry which it had the constitutional power to make; that the Committee[1] had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain* v. *Daugherty*, 273 U. S. 135. No question is raised as to the propriety of the scope of the subpoena *duces tecum*, or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional averments essential to the decision of the question presented are, in substance, these: The Senate had appointed the Special Committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail". MacCracken had been served, on January 31, 1934, with a subpoena *duces tecum* to appear "instanter" before the Committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he is a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the Committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the Committee, telegraphed to

[1]Pursuant to Senate Resolution 349, 72nd Congress, Second Session.

each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1, produced all the papers relating to the business of the clients who had so consented.

On February 2, before the Committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1, he personally permitted Givven, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized him to take therefrom papers which did not relate to air mail contracts. Givven, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice-president of Northwest Airways, Inc., without MacCracken's knowledge, requested, and received from, his partner Lee permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the Committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a waste-paper basket.

Upon the conclusion of MacCracken's testimony on February 2, the Committee decided that none of the papers in his possession could be withheld under the claim of privilege.[2] Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the Committee all the papers then remaining in the files. On February 3, (after a request therefor by MacCracken) Givven restored to the files what he stated were all the papers taken by him. The pe-

[2]Upon the conclusion of the hearing on February 2, the Committee made to the Senate a repor (No. 254) setting forth the facts elicited. Thereupon the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant-at-Arms to take MacCracken into custody before the bar of the Senate; "to bring with him the correspondence . . . referred to and then and there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound. . . ." The warrant was served on February 2, 1934; MacCracken was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On

tition does not allege that any of the papers taken by Brittin were later produced.[3] It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States "to the best of his ability, knowlege and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 . . . all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in *Kilbourn* v. *Thompson,* 103 U. S. 168, there was no legislative duty to be performed; or because, as in *Marshall* v. *Gordon,* 243 U. S. 521, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending

that day (in view of Resolution No. 172) he was released from custody under Resolution No. 169; and the proceedings under Resolution No. 169 are not here involved.

[3]But the brief for MacCracken, the respondent, states: "By February 6th every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate." The reference in the brief is to the fact (to which attention was called by counsel for Jurney) that, after MacCracken and Brittin had testified, post office inspectors, acting for the Committee, searched the sacks of waste papers taken from Brittin's office; and succeeded in collecting most of the pieces of the papers which Brittin destroyed. By pasting these pieces together they were able to restore for the Committee most of the papers removed from the Northwest Airways, Inc., files. (Senate Document No. 162, 73rd Cong., 2nd Sess., pp. 106-116.

act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795;[4] and since then it has been exercised on several occasions.[5] It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies.[6] In *Anderson* v. *Dunn*, 6 Wheat. 204, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in *Marshall* v. *Gordon*, *supra*, upon which MacCracken relies, must be read in the light of the particular facts.

[4]Robert Randall and Charles Whitney were taken into custody by the House of Representatives, on December 28, 1795, on charges of attempting to bribe some of its members. Whitney was discharged on January 7, 1796, before trial. Randall, however, on January 6, was found guilty of a contempt and of a breach of the privileges of the House, was reprimanded by the Speaker, and was committed to the custody of the Sergeant-at-Arms until further order of the House. On January 13, his petition to be discharged from custody was granted, upon payment of fees. 5 Annals, 4th Cong., 1st Sess., 166-195, 232, 200-229, 237, 243.

[5]In 1832, Samuel Houston, having been arrested and tried by the House of Representatives for assaulting a member, was reprimanded and discharged on payment of fees. 8 Debates, 22nd Cong., 1st Sess., 2512-2620, 2810-3022. In 1865, A. P. Field was taken into custody for assaulting a member and was reprimanded by the Speaker. 70 Globe, 38th Cong., 2nd Sess., 991. So too, Charles C. Glover, in 1913. Cong. Rec., 63rd Cong., 1st Sess., 281-283, 499-503, 1431-1453. In 1870, Patrick Wood, for a similar offence, was imprisoned for three months by order of the House. 94 & 95 Globe, 41st Cong., 2nd Sess., 4316-17, 4847, 5253, 5301. In 1795, Sen. James Gunn, whose challenge of a member of the House was considered a breach of privilege, escaped with an apology. 5 Annals, 4th Cong., 1st Sess., 786-790, 795-798. See Shull, Legislative Contempt—An Auxiliary Power of Congress (1934) 8 Temple L. Quart. 198.

[6]See Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of Pa. L. Rev. 691, 700-719; Clarke, Parliamentary Privilege in the American Colonies, Essays in Colonial History Presented to Charles McLean Andrews (1931), pp. 124, *et seq.*; May, Law and Usage of Parliament (5th ed., 1863), pp. 83-97. Since the American Revolution, it has been held that colonial

It was there recognized that the only jurisdictional test to be applied by the court is the character of the offence; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means.[7] Compare *Ex parte Nugent,* Fed. Cas. No. 10,375; *Stewart* v. *Blaine,* 1 MacArthur 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power concerned, not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power.[8] The ground for

assemblies of the British Empire, have, in the absence of express grant, and "without any usage, any acquiescence, or any sanction of the Courts of Law," no power to adjudicate upon, or punish for, contempts, Kielley *v.* Carson, 4 Moore P. C. 63; even when the contempt is committed in the presence of the Assembly by one of its own members. Doyle *v.* Falconer, L. R. 1 P. C. 328; Barton *v.* Taylor, 11 App. Cas. 197; compare Whitcomb's Case, 120 Mass. 118, 122. But upon some colonial assemblies contempt powers as broad as those of the British House of Commons have been conferred. Compare Dill *v.* Murphy, 1 Moore P. C. (N. S.) 487; The Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R. 3 P. C. 560; Fielding *v.* Thomas (1896) App. Cas. 600.

[7]The many instances in which the Houses of Congress have punished contumacious witnesses for contempt are collected and discussed in Eberling, Congressional Investigations (1928). See, too, Dimock, Congressional Investigating Committees (1929); Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harv. L. Rev. 153; compare May, *op. cit., supra,* pp. 407, 408. Witnesses found guilty of prevaricating before investigating committees have been imprisoned by the House of Commons under circumstances indicating that there was no thought of inducing further testimony, but only of punishing for the past offence. See case of Charles Woolfen, 112 Comm. Jour. 354, 372, 377; of Acton, Sheriff of London, Petyt, Miscellanea Parliamentaria (1680) p. 108; of Randolph Davenport, *Id.,* p. 120.

[8]See remarks of Sen. Charles Pinckney in the case of the Editor of the Aurora, 10 Annals, 6th Cong., 1st Sess., 69; of Rep. Barbour and Rep. Poindexter in the case of Colonel Anderson, 32 Annals, 15th Cong., 1st Sess., 624, 654; of Rep. Polk in the case of Samuel Houston, 8 Debates, 22nd Cong., 1st Sess., 2512; of Sen. Sumner in the case of Thaddeus Hyatt, 53 Globe, 36th Cong., 1st Sess., 1100; see, too, Jefferson's Manual, §§ 293-299.

such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, *Kilbourn* v. *Thompson, supra*; and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes. *Marshall* v. *Gordon, supra.*

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, R. S. § 102, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair* v. *United States*, 279 U. S. 263. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.[9] That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman*, 166 U. S. 661, 671-672: "We grant that Congress could not divest itself or either of its Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offence. Compare *Ex parte Hudgings*, 249 U. S. 378, 382.[10] As was said in *In re Chapman, supra*, "the same act may be an offence against one jurisdiction and an offence against another; and indictable statutory offences may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuito* and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legis-

[9]See remarks of Rep. Orr, 43 Globe, 34th Cong., 3rd Sess., 404, 405.

[10]Samuel Houston was in fact indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House. See 2 Ops. Attys. Gen. 655.

lative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers". Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597; *Henry* v. *Henkel*, 235 U. S. 219; *Matter of Gregory*, 219 U. S. 210.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.